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SUPERIOR COURT OF STATE OF ARIZONA
COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

vs.

JAMES ARTHUR RAY,

Defendant.

CASE NO. VCR1300CR201080049

DEFENDANT JAMES ARTHUR RAY'S

(1) MOTION TO COMPEL DISCLOSURE OF ALL INFORMATION AND MATERIAL REGARDING THE MEDICAL EXAMINERS' OPINIONS ON CAUSE OF DEATH; AND

(2) REQUEST FOR SANCTIONS AGAINST THE STATE FOR ASSERTING WORK PRODUCT CLAIM AND INSTRUCTING WITNESSES TO NOT ANSWER QUESTIONS IN BAD FAITH.

REQUEST FOR EXPEDITED ORAL ARGUMENT

TO THE HONORABLE WARREN R. DARROW AND SHEILA POLK, YAVAPAI COUNTY ATTORNEY:

PLEASE TAKE NOTICE that, on July 20, 2010, or as soon thereafter as the matter may be heard in the Superior Court of Arizona in and for the County of Yavapai, Defendant James Arthur Ray, by and through his attorneys of record, will move this Court for an order compelling disclosure and request for sanctions pursuant to Ariz. R. Crim. P. 15.1 and 15.7. This motion is based on the attached Memorandum of Points and Authorities, the Declaration of Truc T. Do, the files and records in this case, and any argument and evidence adduced at the hearing on this matter.

DATED: June 29, 2010

MUNGER, TOLLES & OLSON LLP
BRAD D. BRIAN
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THOMAS K. KELLY

By: _____

Attorneys for Defendant James Arthur Ray

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

There is no clinical evidence that Kirby Brown, James Shore and Liz Neuman died of heat stroke, as theorized by the State in its prosecution of Mr. Ray. Indeed, two months into their investigation of what killed Ms. Brown, Mr. Shore, and Ms. Neuman, the medical examiners could not agree on the cause of death. Dr. A.L. Mosley, who autopsied Ms. Neuman on October 19, 2009, did not agree with Dr. Robert Lyon, who autopsied Ms. Brown and Mr. Shore on October 9, 2009, that the cause of death was heat stroke. Dr. Mosley's disagreement with Dr. Lyon was based on the fact that the critical medical criteria for heat stroke were simply not there. There was no evidence that Ms. Neuman had the requisite body temperature, dehydration, or skin changes for a diagnosis of heat stroke, according to Dr. Mosley's review of the medical records. In fact, neither did Ms. Brown or Mr. Shore.

On December 14, 2009, the State held a meeting for the medical examiners to work out their differences, or as Dr. Mosley said, to "try[ ] to coordinate our reports ... to have a dialogue about our thinking about why these people were dead," or as Dr. Lyon said, "to discuss those issues and get input on to as to what other opinions were" as to cause of death. At this meeting, Detective Ross Diskin presented a Power Point slideshow to the medical examiners of his version of the "facts and evidence" from the Sheriff's investigation. Both medical examiners were given a copy of the Power Point, and both considered the Power Point to make their final conclusions as to cause of death. Only after this meeting did the medical examiners issue their autopsy reports on February 2, 2010, nearly four months after the autopsies and one day before the State took its case to the Grand Jury for an indictment against Mr. Ray. Nothing about this controversy was mentioned to the Grand Jurors, or disclosed to the defense under the State's mandatory disclosure obligations of Rule 15.1, or most troubling, under the State's constitutional obligations of *Brady*.

Instead, Mr. Ray's attorneys uncovered these exculpatory facts during a defense interview of Dr. Mosley on May 21, 2010, in which Deputy County Attorney Bill Hughes sat silently with no objections. After Dr. Mosley's interview, the defense requested that the State

disclose: (1) the names of all persons who attended the meeting, (2) a copy of the Power Point, (3) any audio recording of the meeting, (4) notes of the meeting, and (5) any *Brady* material that arose in the meeting. County Attorney Sheila Polk refused Mr. Ray's requests — amazingly including even the *names* of the persons who attended the meeting — with a blanket assertion that "*meetings* between the prosecutors, investigators, and medical examiners are work product." The County Attorney also claimed there was no *Brady* material to provide.

Recently, the defense attempted to interview some of those it believed were present at the December meeting: Ross Diskin, Mike Poling, and Tom Boelts of the Yavapai County Sheriff's Office on June 16, 2010; and Dr. Mark Fischione, Chief Medical Examiner for Maricopa County and for Yavapai County by independent contract, and Dr. Lyon on June 17, 2010. Again, the State blocked Mr. Ray's attempts to ascertain the truth about this meeting with frivolous work product objections and instructed the witnesses, including the medical examiners, to not answer questions — a spectacle that perplexed even the doctors who, in their collective 36 years as medical examiners, have never been instructed by a prosecutor to withhold information.

From the undisputed record, it is an unavoidable conclusion that the State asserted and maintains its work product claim in bad faith. Ariz. R. Crim. P. 15.4(b) sets forth a "limited work product [rule] protecting documents only to the extent that they constitute *legal research or the 'theories, opinions and conclusions' of the parties and their agents*." Comment to Ariz. R. Crim. P. 15.4(b) (emphasis added). The only theories, opinions, and conclusions discussed at this meeting were those of the medical examiners — who are not prosecution agents, but *trial witnesses* whose theories, opinions, and conclusions are *evidence* that the State intends to use to convict Mr. Ray of homicides. Arizona's limited work product rule protects the County Attorney's legal opinions, theories, or conclusions from disclosure — not inconvenient facts the prosecutors would prefer remained concealed.

Moreover, the County Attorney's position that there is no *Brady* material from the meeting with the medical examiners is profoundly disingenuous. This is not a "who done it" case. The State charged Mr. Ray with reckless manslaughter on the sole theory that Mr. Ray's conduct caused the participants to die. It is untenable to say that the medical examiners'

disagreement over the cause of death and their findings of medical facts that are inconsistent with the State's theory of heat stroke is not exculpatory.

Mr. Ray moves this Court for an order compelling the State to disclose and provide the following:

(1) the names of all persons who attended the December 14, 2009 meeting;

(2) a copy of the Power Point slideshow and any other material provided to the medical examiners;

(3) any notes, including without limitations those of the prosecutors to the extent that they contain *only* the statements of the medical examiners at the meeting;

(4) re-interviews of Drs. Fischione and Lyon, Detective Diskin and Sergeant Boelts without further obstruction from the State.

Because the State obstructed the defense interviews with frivolous work product objections and has knowingly withheld *Brady* material, Mr. Ray requests monetary sanctions pursuant to Ariz. R. Crim. P. 15.7(5) and (6), in the form of costs incurred from bringing this motion and in re-interviews of the witnesses, and any other sanction the Court deems appropriate.

II. FACTS

A. THE MEDICAL EXAMINERS FOUND CLINICAL EVIDENCE *INCONSISTENT* WITH THEIR CONCLUSIONS THAT THE DECEDENTS DIED OF HEAT STROKE.

"There's [sic] very rigorous criteria for defining heat stroke." Exhibit 54[1], Transcript of Dr. A.L. Mosley May 21, 2010 Defense Interview at 14:16 ("Mosley Tr."). A *clinical* diagnosis of heat stroke death requires evidence of a core temperature of 106-107° Fahrenheit, skin changes, and neurological changes such as delirium. *Id.* at 19:16-20:9. Additionally, the clinical diagnosis of heat stroke death requires evidence of dehydration or electrolyte imbalance. *Id.* at 28:27-30:16, 31:13-23; Exhibit 63, Transcript of Dr. Robert Lyon June 16, 2010 Defense Interview ("Lyon Tr.") at 19:25-20:24. Thus, Dr. Mosley and Dr. Lyon searched through the medical records of all three decedents looking for clinical evidence of heat

[1] All exhibits referenced herein are attached to the Declaration of Truc T. Do ("Do Decl."), filed in support of Motion to Change Place of Trial and Motion to Compel Disclosure.

stroke and found none. Mosley Tr. at 29:17-31:9; Lyon Tr. at 18:3-27.

Rather, the medical examiners found clinical evidence that was ***inconsistent*** with heat stroke: lab results showed that none of the decedents were dehydrated. Dehydration is critical because "that would be evidence of hyperthermia." Mosley Tr. at 31:20-23. Dr. Mosley searched the medical records for a particular "temperature and any other signs of heat stroke," including neurological changes, skin changes, and dehydration. *Id.* at 29:23-30:24. Asked what he found, Dr. Mosley stated:

> I don't know. I don't remember, and ***I kind of think that it wasn't there. ... I don't think she had clear evidence of being dehydrated*** from the lab reports that were at the hospital.

Id. at 29:23-30:24 (emphasis added).

Dr. Lyon tested vitreous fluid (the clear gel that fills the space between the lens and the retina of the eyeball) for evidence of dehydration or electrolyte imbalance in Mr. Shore and Ms. Brown. Lyon Tr. at 19:25-20:20. Dr. Lyon explained that "vitreous is important for looking for evidence of dehydration" and so it was noted on the lab request form that "vitreous [is] very important in this case." *Id.* at 20:5-10 (emphasis in original). That "important" piece of evidence, however, came back negative for dehydration in both Mr. Shore and Ms. Brown. Instead, they were "***essentially normal***." *Id.* at 20:22-24 (emphasis added).

Inexplicably, the medical examiners' opinions on cause of death ignored the clinical evidence that was inconsistent with heat stroke or hyperthermia, choosing to rely instead on pure circumstantial evidence.

B. THE MEDICAL EXAMINERS' CAUSE OF DEATH OPINION WAS "90-95 %" CIRCUMSTANTIAL FOR MR. SHORE AND MS. BROWN, AND "99.8752%" CIRCUMSTANTIAL FOR MS. NEUMAN.

The autopsies also offered no clue as to what killed Mr. Shore, Ms. Brown, and Ms. Neuman, since there are no anatomical findings specific for heat stroke. Mosley Tr. at 27:16-19; Lyon Tr. at 12:16-18. All that the autopsies could tell the medical examiners is that they did not die of natural causes or some other disease. *Id.* With no clinical evidence and no anatomical findings of heat stroke, and ignoring the inconsistent clinical evidence, Drs. Lyon and Mosley rendered their opinions on cause of death almost exclusively on the *reported*

circumstances of death provided by the Yavapai County Sheriff's Office investigation.

For Dr. Lyon, "the circumstantial evidence, the initial background, further investigation, witness statements, [and] press photographs" accounted for "**90, 95%**" of his conclusion on cause of death, which was heat stroke. Lyon Tr. at 17:16-19 (emphasis added); *see also* Exhibits 66 and 67. Dr. Mosley stated that he "absolutely" relied on the reported circumstances to draw his conclusion. Mosley Tr. at 22:16-20. Indeed, he gave the reported circumstances "[a] great deal of weight. **99.8752 percent**." Mosley Tr. at 22:16-20 (emphasis added). Thus Dr. Mosley wrote that "[b]ased on the autopsy findings [which were negative] and investigative history, *as available to me*, it is my opinion that [Ms.] Neuman ... died as a result of multisystem organ failure due to hyperthermia due to prolonged sweat lodge exposure." Exhibit 68 (emphasis added); Mosley Tr. at 27:16-19.

Both Dr. Lyon and Dr. Mosley took nearly four months to issue these opinions, and did so only after meeting with the County Attorney and Sheriff's Office on December 14, 2009 to discuss their disagreement over cause of death and obtain the reported circumstances, including the Power Point.

C. THE MEDICAL EXAMINERS' DISPUTE OVER CAUSE OF DEATH

Dr. Mosley did not agree with Dr. Lyon on calling cause of death heat stroke, because there was no clinical evidence of it. Mosley Tr. at 11:19-25, 14:11-15:2, 21:14-28. That is — Dr. Mosley did not see evidence of the requisite body temperature of 106-107° Fahrenheit, dehydration, skin changes, and neurological changes such as delirium in Ms. Neuman. *Id.* at 19:16-20:10. And since he was "already relying a lot on reported history to make this cause of death," Dr. Mosley was unwilling to further assume (as Dr. Lyon did for Mr. Shore and Ms. Brown) that Ms. Neuman had these clinical signs of heat stroke. *Id.* at 18:19-19:4. So to reconcile the absence of clinical evidence for heat stroke, Dr. Mosley opted to call Ms. Neuman's cause of death a "multisystem organ failure due to *hyperthermia*," rather than heat stroke. *Id.* at 14:11-11-15:2 (emphasis added).

To be sure, Dr. Mosley characterized his disagreement with Dr. Lyon as one of "quibbling" over terminology and not one of actual substance. Dr. Mosley explained, "So Dr.

Lyon ... wanted to call his ... heat stroke, and I had my own reasons for not wanting to call it heat stroke. And it's just you know wording basically, there's no real difference in the, in what we mean by our words." *Id.* at 11:14-26. The characterization, however, is curious at best given Dr. Mosley's definition of hyperthermia:

> [H]yperthermia is ... it means you're too hot. ... It's the ... too hot is when ... So the ... so you know but like ***106, 107 degrees Fahrenheit***, people are too hot to maintain their normal body functions. They're, the ... so their brain is reacting is, telling it and they're shunting blood to the periphery to use the ***evaporation effects and sweating*** is enhanced. There's a lot of physiological changes that come and your heart's pumping a lot faster to move blood and to try to cool itself and when it is so hot that your life is in danger, that is too hot.

Id. at 14:11-15:2 (emphasis added). For Dr. Mosley, the clinical evidence required for hyperthermia — a body temperature of 106-107° Fahrenheit and evidence of dehydration — is the same as heat stroke.

If the dispute was one only of terminology, query why the State needed a meeting with both medical examiners and their supervisors to discuss the difference in opinions, and has taken such desperate positions to maintain secrecy around the meeting. Dr. Mosley's description of the nature of the disagreement suggests greater conflict between the medical examiners than a quibble over terminology. Dr. Mosley stated, " [i]t was my impression that Dr. Lyon had probably already made up his mind about exactly how he wanted to sign these death certificates and nothing anyone was gonna say would change his mind. Not that I was trying to." Mosley Tr. at 16:1-4. He then said, rhetorically, "just tow the party line, why can't I just do that?" *Id.* at 22:14.

D. THE STATE'S MEETING WITH THE MEDICAL EXAMINERS

On December 14, 2009, the County Attorney held a meeting at the County Attorney's Office with Dr. Lyon and Dr. Mosley, and their supervisors. It appears that County Attorney Sheila Polk and her deputies, Bill Hughes, Steve Sisneros and others, were present. It also appears that Detectives Ross Diskin and Mike Poling, Captain Dave Rhodes, Lieutenant Tom Boelts, and Sergeant Dan Winslow were present from the Yavapai County Sheriff's Office.

Dr. Mark Fischione, Chief Medical Examiner for Maricopa County and for Yavapai County by independent contract, and a few unidentified medical investigators from the Coconino Medical Examiner's Office were present. Dr. Mosley and his supervisor, Dr. Zarnecki, and Dr. Lyon telephoned into the meeting. Mosley Tr. at 12:2-27, 13:8-24; Exhibit 59, Transcript of Detective Ross Diskin June 16, 2010 Defense Interview ("Diskin Tr.") at 16:23-19:25. There were others at the meeting, but the State has refused to disclose even the names of the people at the meeting under a work product claim. *See e.g.*, Exhibit 56. Instead, Mr. Ray's attorneys have had to piece together the list from partial answers obtained in defense interviews.

Three things, however, are clear about this meeting: (1) the medical examiners knew they had a difference of opinion *before* the meeting and were at the meeting to specifically resolve the conflict in their opinions, conclusions and findings; (2) Detective Diskin gave the medical examiners a Power Point slideshow of his version of the "facts" to help the medical examiners reach a conclusion on cause of death; and (3) there was ***no*** discussion by anyone of the State's legal research or theories, opinions or conclusions.

1. The medical examiners had a "dialogue" on cause of death.

Dr. Mosley described the December meeting as an attempt "to coordinate our reports basically, and the release of the information and we discussed ... *We wanted to have a dialogue about our thinking about why these people were dead, and we did.*" Mosley Tr. at 11:2-8 (emphasis added). "So there's a dialogue about cause and manner basically." *Id.* at 11:15-17. It was at this December meeting that Dr. Mosley discussed with Dr. Lyon his reasons "for not wanting to call it heat stroke." *Id.* at 11:14-25.

Dr. Lyon also explained that "[t]here was a difference of opinion with Dr. Mosley and Dr. Zarnecki in that they opted for hyperthermia. And then there was a discussion of accident versus homicide. But those were largely dealt with during the meeting." Lyon Tr. 22:8-13. Furthermore, Dr. Lyon stated the December meeting was held to resolve that difference of opinion, "*[t]o discuss those issues and get input on to as to what other opinions were.*" *Id.* at 22:27-23:12 (emphasis added).

Dr. Fischione, who was not involved in the death investigations of any of the decedents, described his role as "being sort of the ***mediator*** of the meeting that took place in December." Exhibit 62, Transcript of Dr. Mark Fischione June 17, 2010 Defense Interview ("Fischione Tr.") at 13:1-2 (emphasis added). The defense asked Dr. Fischione what he meant by "mediator," but the State immediately objected and instructed him to not answer based on work product. *Id.* at 13:4-11.

2. The medical examiners considered Detective Diskin's Power Point slideshow to reach their conclusion on cause of death.

Detective Diskin prepared a Power Point which contained only what he called the "facts and evidence" obtained from his investigation, or "pretty much entirely witness statements." Diskin Tr. at 30:11-23. No one from the County Attorney's Office was involved in its preparation, nor did it contain any legal theory, opinion or conclusion of the State. *Id.* Detective Diskin presented the Power Point to the medical examiners "to help them come to whatever conclusions they would come to." *Id.* at 26:7-11. Detective Diskin expected the medical examiners to consider his presentation of the Sheriff's investigation to determine cause and manner of death. *Id.* at 28:10-13. And the medical examiners did.

Copies of the Power Point were emailed to Drs. Mosley, Lyon and Fischione. *Id.* at 26:24-28. Both Drs. Mosley and Lyon said that they relied on the facts they learned from the meeting to reach their conclusion on cause of death. Mosley Tr. 29:11-16; Lyon Tr. at 14:2-8,14:26-15:9, 17:8-15. Dr. Mosley stated that "[d]uring that conference call, the facts of the case were discussed, and you know, I thought that was pretty reliable about you know the sweat lodge you know, the scene around it." Mosley Tr. 29:11-16. Moreover, Dr. Lyon stated that he specifically relied on *the meeting* and the *Power Point* as a basis for his opinion that Mr. Shore and Ms. Brown died of heat stroke. Lyon Tr. at 17:8-15.

3. There was no talk of the State's theories, opinions or conclusions.

The State claims the meeting is protected work product, but nothing was said by any attorney at the meeting, Diskin Tr. at 38:15-39:8, let alone anything about the State's legal theories, opinions, or conclusions, Poling Tr. at 20:28-21:4. Consistent with the medical

examiners' description of the meeting, Detective Poling stated that Drs. Mosley, Lyon and Fischione "were discussing their findings together and seeing if they can, if they'd come up with the cause and manner." Poling Tr. at 23:15-23.

E. THE STATE'S INCONSISTENT WORK PRODUCT CLAIM

Entirely consistent with the frivolity of its work product claim, the State has been utterly inconsistent in its various assertions. First, while withholding exculpatory information about the meeting from the accused, the State presented cherry picked information from the meeting as evidence to the Grand Jury. *See* Transcript of Grand Jury Proceedings, February 3, 2010, No. 156-GJ-17468, at 15:1-16:13 (Detective Diskin testified that the medical examiners told him in a meeting that their manner determination of accident was not legally dispositive. Since every witness and the County Attorney claim there was only one meeting with the medical examiners, Detective Diskin was testifying about the December meeting.).

Second, on May 21, 2010, the State allowed the defense to question both Dr. Mosley and Detective Diskin about the existence and the substance of the December meeting without any objections or claim of work product. *See* Mosley Tr. Indeed, when Dr. Mosley struggled with his recollection, the defense asked Detective Diskin when the meeting occurred and who was present. Detective Diskin asked Mr. Hughes if he could answer and Mr. Hughes replied, "[i]f you can remember, you can, you can answer Ross." Mosley Tr. 13:8-24. At the end of the interview, and in Mr. Hughes' presence, Detective Diskin told Mr. Ray's attorneys he had also presented a Power Point of "facts" at the meeting and emailed a copy to at least Dr. Lyon. Do Decl. ¶¶ 12-13.

On May 24, 2010, Mr. Ray made a written request for discovery pertaining to the December meeting, including specifically: (1) the names of all persons in attendance, whether personally or telephonically; (2) a copy of the Power Point and any other documents or demonstratives presented during the conference; (3) the audio recording of the meeting; (4) any notes taken by any attendants in connection with the conference; and (5) the existence of any *Brady* material that arose in this conference. Exhibit 55. On May 26, 2010, the County Attorney

refused each of Mr. Ray's requests with a blanket assertion that "*meetings* between the prosecutors, investigators, and medical examiners are work product." Exhibit 56. The County Attorney also claimed, despite substantial evidence to the contrary, that there was no *Brady* information from the December meeting. *Id.*

On June 16, 2010, with the same defense questions about the same meeting, the State through Mr. Sisneros *partially* objected and allowed some answers by Detective Diskin, but then did not object at all to any questions asked of Detective Poling. *See* Diskin Tr. and Poling Tr. Next, the State through Mr. Hughes objected to any questions asked of Lt. Boelts and instructed him to not answer. *See* Exhibit 55, Transcript of Lt. Tom Boelts June 16, 2010 Defense Interview ("Boelts Tr."). On June 17, 2010, Mr. Hughes again objected to any questions asked of Drs. Fischione and Lyon, and instructed the medical examiners to not answer any questions pertaining to the meeting. *See* Fischione Tr. and Lyon Tr. When asked about the State's inconsistent positions and obvious waiver of any work product protection, for argument sake, Mr. Hughes denied there had been any waiver.

The defense has been unable to satisfactorily resolve the matter with the State, after personal consultation and good faith efforts to do so. Do Decl. ¶¶ 10-26.

III. ARGUMENT AND AUTHORITIES

A. RULE 15.4(B) PROTECTS ONLY WRITTEN MATERIAL THAT CONTAIN THE THEORIES, OPINIONS OR CONCLUSIONS OF THE ATTORNEY AND HER AGENTS.

Ariz. R. Crim. P. 15.4(b) provides a ***limited*** attorney work product doctrine: "Disclosure shall not be required of legal research or of *records, correspondence, reports or memoranda* to the extent that they contain the *opinions, theories or conclusions* of the prosecutor, members of the prosecutor's *legal or investigative staff* or law enforcement officers. Ariz. R. Crim. P. 15.4(b) (emphasis added). The "rule adopts a *limited work product* standard ... protecting *documents* only to the extent that they constitute legal research or the 'theories, opinions and conclusions' of the parties and their agents." Comment to Ariz. R. Crim. P. 15.4(b) (internal citation omitted) (emphasis added).

Not only is the rule explicit in its limited scope, the legislature elaborated that

Rule 15.4(b) was intended to follow the work product standard of *Hickman v. Taylor* and the American Bar Association's Standards of Criminal Justice. Comment to Ariz. R. Crim. P. 15.4(b). As recognized by the United States Supreme Court in *Hickman v. Taylor* (1947) 329 U.S. 495, the work product doctrine protects only (1) "the memoranda, briefs, communications and other writings prepared by counsel for his own use in prosecuting his client's case" and (2) "writings which reflect an attorney's mental impressions, conclusions, opinions or legal theories." *Hickman*, 329 U.S. at 508. Likewise, the ABA's Standards for Criminal Justice 11-6.1, which is nearly identical to Rule 15.4(b), provides a work product privilege that protects "papers or documents" in which the "contents ... must be judgmental rather than factual." Commentary to ABA Standards for Criminal Justice 11-6.1; *see also* ABA SJC 11-6.1.

B. MEETINGS WITH MEDICAL EXAMINERS ARE NOT WORK PRODUCT

The State's bald assertion — that "[m]eetings between the prosecutors, investigators and medical examiners are work product protected by Rule 15.4(b)(1)" — is simply preposterous under a plain reading of the rule. Meetings are not documents. Medical examiners are not members of the prosecutor's "legal or investigative staff." And the meeting at issue did not involve any "theories, opinions or conclusions" of the County Attorney or her "investigative staff" or law enforcement.

1. Medical examiners are not members of the prosecutor's legal or investigative staff.

Twice now the State has asserted that medical examiners are agents under their direction and control, specifically to prevent Mr. Ray from discovering the facts underlying the medical examiners' opinions on cause of death — first, by moving to quashing subpoenas *duces tecum* not even objected to by the medical examiners and now by instructing the medical examiners to not answer legitimate inquiries about their death investigation. This Court previously cautioned that medical examiners "may not be included in the categories of persons and entities listed in Rule 15.1(f)(1)-(3) as being under the prosecutor's direction or control." Hon. Warren R. Darrow, Ruling on Motion to Quash Subpoenas *Duces Tecum*, May 5, 2010,

State v. James Ray, V1300CR201080049. What the Court cautioned as a strong possibility, the medical examiners made clear as a certainty: medical examiners are not agents of the prosecutor. Dr. Fischione, the Chief Medical Examiner of Maricopa and Yavapai County, repeatedly told the County Attorney that a medical examiner is not "an agent or arm of law enforcement [or] prosecutors," is not a "member of the prosecutor's staff," but is "separate and distinct" from both. Fischione Tr. 14:27-15:28.

Indeed, Dr. Fischione was so "perplex[ed]" by the State's obstruction of the defense interview, that he insisted on making the following statements for the record:

> [Y]ou know my job is, and I am totally separate, and let me just say this, **I'm totally separate, whether it's Maricopa, Yavapai, Coconino, Yuma, wherever, I'm totally separate from police agency as well as prosecutorial agencies . . . I mean I am a separate entity** and basically . . . I'm like the umpire, I call it as I see it based on the cause and manner of death. Okay?

Id. at 35:2-7 (emphasis added).

> And I want it on the record that you know I am the separate entity even though it's you know it's- you know I'm a contract with Yavapai County, **I'm still a separate body from anything to do with the police or to do with the prosecutor's office.** And that's number one. And number two, after I am finished, and you're going to have the same issues coming up with Dr. Lyon because Dr. Lyon was on the phone during this meeting. And again, I know it's an objection, and I understand that. But this is something where in the course of this investigation that I was a party to, and I just want it on the record.

Id. at Tr. 40:10-18 (emphasis added). In their collective 36 years as medical examiners, neither Dr. Fischione nor Dr. Lyon has ever been instructed by a prosecutor to not answer a question. *Id.* at 34:19-24; Lyon Tr. at 14:21-24.

The State needs to be disabused of its notion that it controls the medical examiners, for the State has now has taken the position that it has the power to silence them. This is not the law. *See e.g, People v. Washington* (1995) 86 N.Y.2d 189, 191-94 (New York medical examiners "are, by law, independent of and not subject to the control of the prosecutor"); *Carrick v. Locke* (1994) 125 Wash.2d 129, 144 (Washington Supreme Court

recognizing that "[r]ather than simply being an arm of the prosecutor, a coroner's inquest, much like the medical examiner's office itself, must operate as a separate entity which renders an independent, objective opinion."). Nor is it right.

2. The only theories, opinions and conclusions involved in the December meeting were those of the medical examiners, not the County Attorney's.

Mr. Ray does not seek the County Attorney's theories, opinions or conclusions, since none were discussed at the December meeting. Diskin Tr. at 38:15-39:-8, Poling 20:28-21-4. The only theories, opinions or conclusions discussed at the December meeting were those of the medical examiners on cause of death. Needless to say, the medical examiners are not retained consultants but expert trial witnesses. As such, the State was required to disclose their "statements" made at the meeting. Ariz. R. Crim. P. 15.1(b)(4), 15.1(e)3), 15.4(a)(1)(iii); *see* Exhibit 52 (defense request for medical examiners' statements).

A prosecutor's notes of what a witness says are not protected work product and it is error to not produce them. *See e.g.*, *State v. Reid* (1976) 114 Ariz. 16, 30 (citing *State v. Nunez*); *State v. Nunez* (App. 1975) 23 Ariz.App. 462, 463 (holding prosecutor's notes containing a witness statement "do not meet the 'work product' exception to disclosure under Rule 15.4(b)(1), ... as they are not 'theories, opinions and conclusions' of the parties or their agents" and "it was error for the prosecution not to have disclosed the statements taken."). Specifically, the work product rule does not protect statements made by a testifying expert. *See e.g.*, *Emergency Care Dynamics, Ltd. v. Superior Court (Maricopa)* (1997) 188 Ariz. 32, 33 ("We hold that a lawyer forgoes work-product protection for communications with an expert witness concerning the subject of the expert's testimony even if the expert also plays a consulting role.") *State v. Ybarra* (1989) 161 Ariz. 188, 194 ("The work product doctrine is not absolute. Like any qualified privilege, a [party] may waive all or part of the protection by electing to present the expert as a witness.").

Moreover, the State is required to disclose all of the medical examiners' findings whether they were written or not. *See e.g.*, *State v. Roque* (2006) 213 Ariz. 193, 208-09 (holding that the State's Rule 15.1 disclosure obligations on expert witnesses apply "even if an expert has

not written down the 'result of physical examinations and of scientific tests, experiments or comparisons,' as long as such results are known to the state.").

C. THE POWER POINT IS NOT PROTECTED WORK PRODUCT BUT FACTS CONSIDERED AND RELIED UPON BY THE MEDICAL EXAMINERS FOR THEIR CONCLUSIONS.

The Power Point given to the medical examiners as a basis for their conclusions on cause of death also is not work product. It does not contain any theories, opinions or conclusions of the County Attorney nor of Detective Diskin, and was prepared without any attorney involvement. Diskin Tr. at 30:11-23. Rather, it was factual, containing "pretty much entirely witness statements" selected by Detective Diskin. *Id.* Detective Diskin presented and provided copies the Power Point slideshow to the medical examiners and expected them to rely on it determine cause and manner, *id.* at 28:10-13, and the medical examiners did. Both Drs. Mosley and Lyon said that they relied on the facts they learned from the meeting to reach their conclusion on cause of death. Mosley Tr. 29:11-16; Lyon Tr. at 14:2-8,14:26-15:9, 17:8-15. Dr. Mosley stated that "[d]uring that conference call, the facts of the case were discussed, and you know, I thought that was pretty reliable about you know the sweat lodge you know, the scene around it." Mosley Tr. 29:11-16. Moreover, Dr. Lyon stated that he specifically relied on ***the meeting*** and the ***Power Point*** as a basis for his opinion that Mr. Shore and Ms. Brown died of heat stroke. Lyon Tr. at 17:8-15.

Arizona's rules for expert disclosure are "designed to give the defendant an opportunity to check the validity of the conclusions of an expert witness and ... have the evidence examined by his own independent expert witness." *Roque*, 213 Ariz. at 207 (internal quotes and citations omitted); *see also* Ariz. R. of Evid. 705 (an "expert [witness] may in any event be required to disclose the underlying facts or data on cross examination"). Mr. Ray cannot check the validity of the medical examiners' conclusion without knowing what facts were provided and, equally important, what facts were not provided to the medical examiners to "help them" reach their conclusions.

Although the Power Point is clearly not protected work product, "discovery may properly be had" even if it were, because it contains "relevant and non-privileged facts" that are

"essential to the preparation of [the] case." *Hickman*, 329 U.S. at 511-12. As the Supreme Court has explained, "[s]uch written statements and documents might, under certain circumstances, be admissible in evidence or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration." *Id.* Such is the case here.

IV. CONCLUSION

For the foregoing reasons, Mr. Ray requests the Court grant its motion to compel disclosure and order the State to provide items (1) the names of all persons who attended the December 14, 2009 meeting, (2) a copy of the Power Point slideshow and any other material provided to the medical examiners, (3) any notes, including without limitations those of the prosecutors to the extent that they contain only the statements of the medical examiners at the meeting, (4) re-interviews of Drs. Fischione and Lyon, Detective Diskin and Sergeant Boelts, and without further obstruction from the State, (5) and *Brady* material. Given the undisputed record, it is an unavoidable conclusion that the State asserted and maintains its work product claim in bad faith. Mr. Ray requests costs in bringing this motion and conducting re-interviews as sanctions, pursuant to Ariz. R. of Crim. P. 15.7.

DATED: June 29, 2010

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